Supreme Court, U.S.
FILED

991777 MAY 8 - 2000

No. _____

In The

Supreme Court of the United States

DIANA C. WESTOVER, a/k/a DIANA C. BINDLOSS,

Petitioner,

v.

JANET RENO, ATTORNEY GENERAL
OF THE UNITED STATES.

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The First Circuit**

PETITION FOR WRIT OF CERTIORARI

M. Ronald Gould *
Justin Gould (On the Brief)
999 Brickell Avenue, Suite 700
Miami, Florida 33131
(305) 371-9711

Attorneys for Petitioner

* *Counsel of Record*

53 pp

QUESTIONS PRESENTED

1. Can the exclusionary rule be used to suppress evidence where Immigration and Naturalization Service (INS) agents have judicially been found to have violated the Fourth and Fifth Amendments to the Constitution and violated 8 U.S.C. § 1357(a)(2), § 287(a)(2) Immigration and Nationality Act?

2. Did the Court of Appeals repeal or nullify 8 U.S.C. § 1357(a)(2) when it held that INS agents violated the statute but as a "mere statutory argument" cannot give Westover a basis for relief because a Fourth Amendment violation provides no basis to invalidate a deportation proceeding?

3. What purpose does 8 U.S.C. § 1357(a)(2) serve in the law enforcement area of the Immigration and Nationality Act in light of the Court of Appeals' opinion?

4. In light of the Fourth Amendment's restrictive use in civil deportation proceeding should this Court recognize 8 U.S.C. § 1357(a)(2) as the fundamental law protecting aliens who are unlawfully arrested?

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Doris Meissner, Commissioner, Immigration and Naturalization Service were parties before the Court of Appeals.

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties to the Proceeding	ii
Table of Contents	iii
Table of Authorities	v
Petition to Review	1
Opinions Below	1
Statement of Jurisdiction	1
Constitutional and Statutory Provisions Involved	2
Statement of the Case	2
Reasons for Granting the Writ	5
I It is time for the court to revisit *INS v. Lopez-Mendoza* and provide clarification and guidance to one of the most troubled and least understood areas of immigration and nationality law, arrests and search and seizures	5

		Page
II	The petition should be granted because the opinion below is in conflict with the Ninth's Circuit's decision in *Orhorhaghe v. INS*.....	6
III	This petition should be granted because to do otherwise would allow the Court of Appeals' decision to bind the BIA in all removable proceedings which arise in the First Circuit.....	12
IV.	The Court of Appeals decision has the effect of repealing or nullifying 8 U.S.C. § 1357 (a) (2) which only congress has the authority to do.....	12
V.	The petition should be granted because the Court of Appeals' opinion is in conflict with opinions of this Court.....	13
Conclusion		16

TABLE OF AUTHORITIES

Cases Cited:	*Page*
In Au Yi Lau v. U.S. I.N.S., 445 F. 2d 217 (C.A.D.C. 1971)	13
INS v. Lopez-Mendoza, 468 U.S. 1032 (1984)	2, 5, 6, 8, 9, 10, 12, 13, 14, 16
Orhorhaghe v. INS, 38 F. 3d 488 (9th Cir. 1994)	7, 11
Pacific Molasses Company v. F.T.C., 356 F. 2d 386 (1966)	15
Rochin v. California, 342 U.S. 165, 72 S. Ct. 205 (1952)	10
Service v. Dulles, 354 U.S. 363, 77 S. Ct. 1152 (1957)	15
United States, ex rel. Accardi v. Shaughnessy, 347 U.S. 260, 74 S. Ct. 499 (1954)	15
In re Vicente Cervantes-Torres, I & N Dec. 3277 (BIA 1996)	11
Vitarelli v. Seaton, 359 U.S. 535, 547, 79 S. Ct. 968 (1959)	15

	Page
Woodby v. INS, 385 U.S. 276 (1966)	6
Administrative Decisions:	
Matter of Garcia-Flores, 17 I & N Dec. 325 (BIA 1980)	15
Matter of L, 20 I & N Dec. 3183 (1996)	15
Matter of Toro, 17 I & N Dec. 2784 (1980)	10
Constitutional Provisions:	
U.S. Const. Amendment IV	2, 5, 6, 7, 8, 9, 13
U.S. Const. Amendment V	2, 5, 6, 7, 11
Statutes and Regulations:	
28 U.S.C. § 1254 (1)	1
8 U.S.C. § 1105 (a) (1996)	1
8 U.S.C. § 1357 (a) (2)	2, 6, 12, 14, 16
Immigration And Nationality Act:	
§ 106 (a)	1

Page

§ 309 (c) (4) IIRIRA..... 1

APPENDIX

Appendix A..... 1a

Appendix B..... 14a

PETITION TO REVIEW

Petitioner, Diana C. Westover, a/k/a Diana C. Bindloss (Westover), respectfully request that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the First Circuit is not reported but can be found at Diana C. Westover, a/k/a Diana C. Bindloss, Petitioner v. Janet Reno, Attorney General of the United States, Respondent, 2000 LW 132652 (9th Cir. 2000) (App. A). The opinion of the Board of Immigration Appeals (BIA) In re: DIANA C. BINDLOSS, Respondent, File No. A71 875 917 (April 14, 1999) is not reported. (App. B).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the First Circuit (Court of Appeals) was entered on February 9, 2000.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

The Court of Appeals has jurisdiction to review a decision of the BIA pursuant to § 106 (a) of the Immigration and Nationality Act, 8 U.S.C. § 1105a (a) (1996), as modified by transitional rules for judicial review contained in § 309 (c) (4) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), as amended by the Extension of Stay in United States for Nurses Act of 1996.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, the Fourth Amendment provides in relevant part "guaranteeing people the right to be secure in their homes and property against unreasonable searches and seizures and providing that no warrants shall issue except upon probable cause." The Fifth Amendment provides in relevant part: "providing that no person shall be deprived of life, liberty or property without due process of law." Title 8 U.S.C. § 1357(a)(2) provides (relevant part) "INS officers shall have power without warrant to arrest any alien in the United States, if he has reason to believe the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest."

STATEMENT OF THE CASE

This case presents two core issues: (1) When judicial bodies find INS law enforcement agents have violated the Fourth Amendment, Fifth Amendment and Title 8 U.S.C. § 1357(a)(2) does that per se rise to the level of egregious conduct as contemplated in *INS v. Lopez-Mendoza*, 468 U.S. 1032 and (1984) and (2) Did the Court of Appeals repeal or nullify 8 U.S.C. §1357(a)(2) when it linked that statute to the Fourth Amendment and declared that Fourth Amendment violations cannot invalidate a removable proceeding and neither could this mere statute. The Court of Appeals left open the question, "Whether evidence obtained from a statutorily invalid arrest should be admitted in an alien's removable hearing is a more difficult question, *cf. Navia-Duran v. INS*, 568 F .2d 803, 809-811 & n.7 (1st Cir. 1977) (excluding coerced confession but not deciding whether INS agent had violated 8 U.S.C. § 1357 (a) (2) or the effect any such violation might have), but the BIA did not consider any evidence from the time of Westover's

arrest."

The Court of Appeals made an erroneous assumption the passport, I-94 (entry document) and Westover's involuntary testimony was not excluded by the BIA. Westover has argued that it is this evidence that form the basis for finding her deportable on all three charges in the order to show cause.

The following facts are limited to those which are relevant to this petition: On March 5, 1992 Westover and her fiancee entered the United States at a border post in Vermont. Agent Labier issued Westover form I-94 (entry document) valid until September 4, 1992, four months after Westover was arrested. Vermont State trooper, Chisholm was conducting an investigation into a marijuana grow operation inside the home of Westover's fiancee. During that two or more month investigation, Chisholm questioned agent Labier, the postman who delivered the mail to the house, a clerk at the hardware store where Westover's finance bought items for the house, and an employee of the utility company that supplies electricity to the house. Not one of those persons interviewed ever mentioned that Westover was with her fiancee or that they even knew he had a fiancee. Officer Chisholm, in preparing an affidavit in support of a search warrant to search the house that Westover's fiancee owned and that Westover lived in, never mention Westover. The fact is that Chisholm in his affidavit states that Westover's fiancee lived in the house alone.

On May 7, 1992 pursuant to a search warrant to search the home, the Vermont State Police and INS agents Boocock and Meskell entered the house (or they appeared shortly thereafter) confronted Westover and Westover's fiancee. The police ordered both of them to sit down while the search for marijuana plants was conducted. Westover's fiancee told the officers where to find the plants. The appeals' record will show

that at no time did the police or the INS agents ask any questions of Westover nor did anyone ever talk to Westover about the marijuana plants or her immigration status. Westover was arrested at the house at about 4:05 p.m. by agent Boocock and Westover was transported to the Vermont State Police Barracks and turned over to agent Boocock. Boocock never spoke to Westover from about 2:00 p.m. until 8:40 p.m. At 8:40 p.m. Boocock was taking Westover's post-arrest statements. An order to show cause was served on Westover at about 11:50 p.m. Westover was incarcerated for 8 days.

On March 5, 1993, Judge Fred I. Parker of the United States District Court for Vermont, after conducting an evidentiary hearing on a motion to suppress brought by Westover's fiancee, found "that Chisholm's testimony was untruthful and tailored to fit the needs of the knock and announce federal statute." The motion to suppress was granted and the case against Westover's fiancee was dismissed. Westover was never charged with any crime.

The Immigration Judge (IJ) upon reconvening the deportation proceeding on March 25, 1993 refused to hear any argument or allow any documents relating to the marijuana grow operation or Judge Fred I Parker's decision suppressing the evidence found in the house. Judge Parker's decision was to be the basis for an evidentiary hearing to suppress Westover's passport, I-94, testimony of agent Boocock and any documents he prepared which were admitted as evidence against Westover.

REASONS FOR GRANTING THE WRIT

I.

IT IS TIME FOR THE COURT TO REVISIT *INS V. LOPEZ-MENDOZA* AND PROVIDE CLARIFICATION

AND GUIDANCE TO ONE OF THE MOST TROUBLED AND LEAST UNDERSTOOD AREAS OF IMMIGRATION AND NATIONALITY LAW, ARRESTS AND SEARCH AND SEIZURES.

It has been sixteen years since Justice Sandra Day O'Connor writing the landmark opinion for the Court in *INS v. Lopez-Mendoza*, 468 U.S. 1032, invited a challenge which would encompass egregious violations or where a challenge was made to eternal regulations or a statute governing search and seizure or illegal arrest issues. at 1050-1051

> Finally, we do not deal here with egregious violations of Fourth Amendment or other liberties that might transgress notions of fundamental fairness and undermine the probative value of the evidence obtained.

The Court of Appeals in issuing its opinion, held that the agents, while participating in a search and seizure of Westover's fiancee's private home, violated the Fourth Amendment. The Court of Appeals further held that the agent arrested Westover illegally in violation of 8 U.S.C. § 1357(a)(2). The (BIA) held that all testimony given by the two INS agents was excluded from consideration. Presumably because the agents violated the Fifth Amendment. It is possible that the exclusion was based on the Fourth Amendment or the statutory violation. All of these issues were raised before the BIA. These bad faith acts and deliberate violations of the Constitution rise to the level of egregious conduct so as to be within the exception contemplated in *INS v. Lopez-Mendoza*. The Court of Appeals in spite of the INS agents violating every known protection for aliens against unreasonable searches and seizures, illegal arrests and due process of law violations, affirmed the BIA in its finding that Westover was deportable. Can there be any argument that

clarification and guidance is needed?

Westover has never advocated that her deportation proceeding should be invalidated or vacated simply by reasons of violations of the Fourth or Fifth Amendments or in violation of 8 U.S.C. § 1357 (a) (2) or that her body or presence should be excluded. Westover maintains that when INS agents commit violations which constitute egregious conduct or those violations are held to be in violation of due process of law pursuant to the Fifth Amendment, as present in this case, that the evidence obtained should be excluded including Westover's own testimony. If the INS has independently obtained evidence, not as a result of constitutional violations, which is sufficient to prove deportability by clear, convincing and unequivocal evidence, then the decision of deportability is valid. *Woodby v. INS*, 385 U.S. 276 (1966).

II.

THE PETITION SHOULD BE GRANTED BECAUSE THE OPINION BELOW IS IN CONFLICT WITH THE NINTH CIRCUITS' DECISION IN ORHORHAGHE v. INS.

This Court in *INS v. Lopez-Mendoza, 468 U.S. 1032 (1984)* established the law on Fourth Amendment violations and its use in civil deportation proceeding. This Court held that an illegal search or seizure in violation of the Fourth Amendment does not apply in civil deportation proceedings, except where the alien is subject to conduct of government agents "that rise to the level of egregious violations of the Fourth Amendment or violate liberties that transgress notions of fundamental fairness and undermine the probative value of the evidence obtained." What about Fifth Amendment due process of law violations? Do these types of violations fall within the second exception? Or are

due process of law violations per se egregious?

Orhorhaghe v. INS, 38 F .3d 488 (9th Cir. 1994), the Ninth Circuit recognized that this Court did not close the door on the use of the Fourth Amendment in civil deportation proceedings. In *Orhorhaghe* at 493, the Ninth Circuit held:

> administrative tribunals are still required to exclude evidence that was "obtained by deliberate violations of the fourth amendment or by conduct a reasonable officer should know is in violation of the Constitution. Applying the same balancing test the Supreme Court had applied in *Janis and Lopez-Mendoza*, we held that when evidence is obtained by such an egregious violation of the Constitution, the probative value of that evidence cannot outweigh the need for judicial sanction.

at 502

> *Lopez-Mendoza* makes clear that an egregious Fourth Amendment violation warrants suppression in a deportation hearing even if the seized evidence is highly reliable and probative.

The Ninth Circuit at p. 502 believed that this Court in *Lopez-Mendoza* stood for the proposition:

> that the government's manner of obtaining evidence can be so offensive as to warrant suppression *regardless of the probative value of the evidence obtained.*

at 502-503

> Thus, we conclude that a violation of the Fourth Amendment can be egregious under *Adamson and Lopez-Mendoza* even without undermining the probative value of the evidence obtained. In fact, we held in *Adamson* that when evidence is obtained by deliberate violations of the Fourth Amendment, or by conduct a reasonable officer should know is in violation of the Constitution, the probative value of that evidence cannot outweigh the need for a judicial sanction. *Adamson* 745 F. 2d at 545 (citing *Lopez-Mendoza*).

The Ninth Circuit relied on the *Lopez-Mendoza* Court at 1044, where this Court emphasized and gave credence to the INS' "comprehensive scheme for deterring Fourth Amendment violations by its officers." This Court was referring to the safeguards set up by the INS for the protection of aliens lawfully present at inspected workplaces. This Court was satisfied that these safeguards were sufficient to protect the public against violations of the Fourth Amendment.

The Ninth Circuit has advocated two reasons for excluding evidence in a civil deportation proceeding or even invalidating the proceeding which *Lopez-Mendoza* did not contemplate, but could easily fall within "liberties that transgress notions of fundamental fairness." Where the INS agent's conduct was deliberate and intentionally violated a Constitutional mandate. The other is by virtue of the INS agent's extensive Fourth Amendment training they knew or should have known when they were violating search and seizure requirements.

The BIA never stated its reason for excluding the testimony. The cases decided by the BIA over the last 30 years

and as recent as 1996 strongly suggest that where there is a violation of due process of law all evidence will be excluded, even voluntary admissions.

The INS' brief to the lower court at pp. 19-20 voiced its own reasoning for the BIA's unusual action:

> Presumably out of an abundance of caution, the BIA excluded from consideration the testimony of officers Labier and Boocock, including any statements made by Westover to them either at the border on March 5, 1992 or after her arrest. A.R. 18. Petitioner's claims that her due process rights were violated that rely on any statements taken by these officers from Westover or any written statements introduced at petitioner's deportation hearings from these officers are therefore moot based on the BIA's decision to exclude their testimony A.R. 18.

The INS did not appeal but acquiesced in the BIA's decision to exclude the evidence thereby conceding its validity.

Westover argues that the BIA's decision to exclude evidence that was relevant and probative and the INS concession, eliminates the need for the Court of Appeal's finding of probable cause. The Court of Appeals committed reversible error by not excluding the balance of the evidence used to support deportability.

The *Lopez-Mendoza* Court did not announce any bright line test as to what conduct constitutes the exceptions to the prohibition of the use of Fourth Amendment violations in civil deportation proceedings. The cumulative effect of the Constitutional and statutory violations that took place here rise

to the level of egregious conduct or that such conduct effects "other liberties that might transgress notions of fundamental fairness." The conduct here eliminates the need to prove the "probative value of the evidence was undermined."

The most condemnable act by agent Boocock was when he arrested Westover after he had examined Westover's passport and entry document I-94. Westover's passport and I-94 provided conclusive proof that Westover was in the United States legally until September 4, 1992. That was four months after the search and arrest took place. At the time of Westover's arrest which occurred at her home during the course of a judicially declared illegal search and seizure, there was no probable cause to believe that Westover had before or now violated any Immigration Law.

This Court in *Lopez-Mendoza* cited *Rochin v. California,* 342 U.S. 165, 72 S. Ct. 205 (1952) and *Matter of Toro*, 17 I & N Dec. 2784 (1980) the Court demonstrated the difference in the kind of evidence which constitutes egregious conduct. In *Rochin* egregious conduct was the use of medication to force narcotics from *Rochin.* In *Toro* at 343 the BIA said:

> The circumstances surrounding an arrest and interrogation, however, may in some cases render evidence inadmissible under the due process clause of the Fifth Amendment. See, *Navia-Duran v. INS*, 568 F. 2d 803 (1st Cir. 1977); *Bong Youn Choy v. INS*, 279 F.2d 642 (9th Cir. 1960) (involving involuntary statements). Moreover, with or without a voluntariness issue, cases may arise in which the manner of seizing evidence is so egregious that to rely on it would offend the fifth amendment's

> due process requirement of fundamental fairness. See, for example, *Ex parte Jackson*, 263 F. 110 (D. Mont. 1920).

In re Vicente Cervantes-Torres, Respondent I & N Dec. 3277 (BIA 1996) the BIA reaffirmed its position at 353, "Initially, we agree with the respondent that the exclusionary rule would exclude any evidence resulting from his egregious arrest." The BIA cited the exceptions in *INS v. Lopez-Mendoza.* The BIA cited *Orhorhaghe v. INS*, 38 F. 3d 488 (9th Cir. 1994), where the Ninth Circuit applied the exclusionary rule to preclude the admission of evidence which that court had determined was the result of egregious government conduct.

The BIA's decisions referred to above fully support the argument that the BIA found these agents conduct violated the due process clause of the Fifth Amendment and the manner in which they seized the evidence was so egregious that to rely on it would be fundamentally unfair.

Westover's testimony during the deportation proceeding should be excluded because it was not voluntary. Westover was required to testify by the INS. Westover's testimony was in defense of the charges in the order to show cause. In *Orhorhaghe v. INS*, 38 F. 3d 488 (9th Cir. 1994) the Court was confronted with the very same situation where the INS claimed that the alien's testimony and admissions in its brief constituted voluntary acts which are admissible. The Ninth Circuit at p. 505 n.27 held:

> We note further that the admission is also a fruit of the unlawful search and seizure, because *Orhorhaghe* made the admission only in order to defend against the seizure.

III.

THIS PETITION SHOULD BE GRANTED BECAUSE TO DO OTHERWISE WOULD ALLOW THE COURT OF APPEALS' DECISION TO BIND THE BIA IN ALL REMOVABLE PROCEEDINGS WHICH ARISE IN THE FIRST CIRCUIT.

IV.

THE COURT OF APPEALS' DECISION HAS THE EFFECT OF REPEALING OR NULLIFYING 8 U.S.C. § 1357 (a) (2) WHICH ONLY CONGRESS HAS THE AUTHORITY TO DO.

The Court of Appeals held at 8a, "*Given that Fourth Amendment violations do not constitute grounds for invalidating removal proceedings, though, this mere statutory argument on similar grounds cannot give Westover a basis for relief.*" *(emphasis supplied).*

This section of the statute is the sole and exclusive authority given to INS agents to arrest aliens in the United States who are not committing or have not committed crimes. This provision of law is the heart of the administration of the law enforcement proceeding of the Immigration and Nationality Act. Title 8 U.S.C. § 1357 (a)(2) is one of five sections dealing with an arrest. Consequently it affects hundreds of thousands of aliens who are arrested for the most numerous and common deportable offenses, overstays and working without authorization. It also has been known to ensnare citizens of the United States.

The Court of Appeals' opinion is founded on the principle laid down in *INS v. Lopez-Mendoza*, 468 U.S. 1032,

at 1051 where Justice O'Connor writing for the Court: "At issue here is the exclusion of credible evidence gathered in connection with peaceful arrests by INS officers. We hold that evidence derived from such arrests need not be suppressed in an INS civil deportation hearing."

The Court of Appeals held that if Fourth Amendment violation does not invalidate deportation proceeding than this "mere statute" would not either. The statute is not dependent on the Fourth Amendment and has no relevancy to this Court's decision in *INS v. Lopez-Mendoza.* The only connection between the Fourth Amendment and this statute is the interpretation the courts have put on the phrase "reason to believe" *In Au Yi Lau v. U.S. I.N.S.*, 445 F. 2d 217 (C.A.D.C. 1971) held "reason to believe within this section must be considered to be equivalent of probable cause." Congress in enacting this statute provided the INS with the statutory authority to make arrests of aliens with and under certain circumstances without a warrant. It may also be said that this statute provides protection and some form of relief for those aliens arrested without probable cause or without a warrant of arrest. This statute is aimed at and is concerned only with the law enforcement provisions of the Immigration and Nationality Act of 1952, as amended.

V.

THE PETITION SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS' OPINION IS IN CONFLICT WITH OPINIONS OF THIS COURT.

Justice O'Connor, writing for the Court in *INS v. Lopez-Mendoza* extended an invitation to bring to the Court's attention a challenge to the eternal regulations of the INS. At *Lopez-Mendoza* at 1050 held, "Moreover, no challenge is raised here

to the INS' own eternal regulations".

Now, more than ever, this Court should provide guidance on the meaning of the statute and the regulations and what is their role in the administration of the Immigration and Nationality Act. We realize that this body of law refers to regulations that an agency promulgates implementing a relevant statute. Westover believes that this Court requires the INS to be as diligent and concerned about complying with the dictates of statutes that Congress enacted as they are about the regulations implementing those statutes.

Prior to *INS v. Lopez-Mendoza* the Fourth Amendment was thought to protect aliens who were searched and/or seized unlawfully. 8 U.S.C. § 1357 (a) (2) allows INS agents to "arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any such law or regulation and is likely to escape before a warrant can be obtained for his arrest" (relevant part of the statute). Now, this is the only remaining law which stands between an alien and an unlawful arrest. The Court of Appeals in its opinion found that the INS agents were required to obtain a warrant of arrest before they arrested Westover at her home. They further found that failure to do so was a violation of the statute. The Court of Appeals should have issued an appropriate sanction so that INS agents in the future will obey the strict mandate of the laws Congress imposes on them.

Congress established important safeguards against arbitrary and uncontrolled use of the statutes authority. The requirement that INS agents have "reason to believe that the alien so arrested is in the United States in violation of any such law or regulation," in and of itself is a strong rein on arbitrary and excessive use of power. Congress saw fit to add another protection by requiring that a warrant of arrest be obtained

unless the alien is likely to escape. In order to obtain the warrant of arrest, the requesting INS agent must articulate the facts to establish probable cause before the warrant will be issued. This is the type of statute which must be strictly construed against the INS and in favor of those aliens who come within its grasp.

This Court has held: "When an administrative agency promulgates rules to govern its proceeding, these rules must be scrupulously observed." See, *Pacific Molasses Company v. F.T.C.*, 356 F. 2d 386 (1966) and *Service v. Dulles*, 354 U.S. 363, 77 S. Ct. 1152 (1957). "This is so even when the defined procedures are generous beyond the requirements that bind such agency." *Vitarelli v. Seaton*, 359 U.S. 535, 547, 79 S. Ct. 968 (1959) (Justice Frankfurter dissenting). "For once an agency exercises its discretion and creates the procedural rules under which it desires to have its actions judged, it denies itself the right to violate these rules." *United States, ex rel. Accardi v. Shaughnessy* 347 U.S. 260, 74 S. Ct. 499 (1954). "If an agency in its proceeding violates its rules and prejudice results, any action taken as a result of the proceeding cannot stand."

The BIA has agreed with the above judicial holdings. In *Matter of L,* 20 I & N Dec. 3183 p.556 the BIA held:

> It is well settled that the regulation which the Service promulgates have the force and effect of law and are binding on the Service.

Westover argues that the proceeding should be invalidated because of the number of Constitutional, statutory and regulatory abuses. The BIA has endorsed this argument. In the *Matter of Garcia-Flores*, 17 I & N Dec. 325 (BIA 1980), "(holding that violation of a Service regulation can result in proceedings being invalidated where the regulation serves a purpose of benefit to the alien and the violation prejudiced

interests of the alien which were protected by the regulation)."

CONCLUSION

This case presents questions of exceptional importance which affect the administration of the law enforcement procedures of the Immigration and Nationality Act.

For the reasons stated above, this Court should issue a writ of certiorari to the Ninth Circuit and reverse the Circuit's holding that 8 U.S.C. § 1357 (a) (2) does not apply to removable proceeding because violations of the Fourth Amendment do not. This Court should reverse the Circuit's holding that Fourth Amendment violations and violations of 8 U.S.C. § 1357 (a) (2) are not egregious and therefore do not fall within the exceptions provided for in *INS v. Lopez-Mendoza*. This Court should vacate the deportation proceeding or exclude any and all other evidence admitted in the proceeding.

Respectfully submitted,

M. Ronald Gould
Justin Gould (On the Brief)
999 Brickell Avenue, Suite 700
Miami, Florida 33131
(305) 371-9711

Attorneys for Petitioner

APPENDIX A

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 99-1564

DIANA C. WESTOVER, a/k/a DIANA C. BINDLOSS,

Petitioner,

v.

JANET RENO, ATTORNEY GENERAL OF THE UNITED STATES,

Respondent.

Before

Torruella, Chief Judge,
Boudin and Lynch, Circuit Judges.

M. Ronald Gould, with whom Justin Gould was on brief, for appellant.

John S. Hogan, Attorney, Office of Immigration Litigation with whom David W. Ogden, Acting Assistant Attorney General, and Karen Fletcher Tortenson, Assistant Director, were on brief, for respondent.

February 9, 2000

LYNCH, Circuit Judge. Diana Westover[1] is a native of Tanzania who married her American fiancé after removal proceedings against her commenced in 1992. Westover has remained in the United States for the past eight years while proceedings against her have been pending. She seeks review of a Board of Immigration Appeals (BIA) final order of removal. In issuing this order, the BIA upheld the decision of the Immigration Judge finding Westover removable and denying her applications for the discretionary relief of adjustment of status and voluntary departure. Certain actions by the INS in this case raise concerns, but in the end those actions are not relevant to the legitimate basis for the removal order, which we affirm.

Westover attacks both the finding that she is removable and the denial of her application for adjustment of status. Westover argues (1) that her deportation proceedings should be voided because they were the result of an illegal search and because her warrantless arrest violated the Fourth and Fifth Amendments of the United States Constitution and violated Immigration and Naturalization Service regulations; (2) that the BIA relied on impermissible factors in affirming the denial of her application for adjustment of status; (3) that the INS should have been estopped from charging her as deportable and instituting removal proceedings against her; (4) that the IJ erred

---

[1] When Petitioner was placed into deportation proceedings, her surname was Bindloss. She married Terry Westover on May 21, 1992. Since Petitioner refers to herself in her brief to this court using the surname Westover, we do the same.

Additionally, Westover named Doris Meissner, Commissioner of the INS, as a respondent. The only proper respondent in an appeal from a BIA final order, though is the Attorney General of the United States. See 8 U.S.C. § 1252(b) (3) (A); Prado v. Reno, No. 99-1297, 1999 WL 1085813, at *1 n.1 (1st Circ. Dec. 8, 1999).

in failing to adjudicate her Form I-601 Application for Waiver; (5) that the INS improperly charged her with being an "overstay," and (6) that the BIA's decision to affirm the finding of deportability is not supported by substantial evidence and the BIA erred in affirming the denial of her application for adjustment of status. For the reasons stated below, we affirm the order of the BIA.

I

The facts are taken from the proceedings before the IJ. Westover is forty-one years old and is a native of Tanzania and a citizen of the United Kingdom. She has resided in the United States almost continuously since 1987. On March 5, 1992, Westover acquired a six month, non-immigrant visitor visa from United States Customs Inspector Jay Labier at the Port of Entry in West Berkshire, Vermont. Westover's then current visa had not yet expired, but she wanted to extend it. Because her old visa had not yet expired, Westover left the United States for a period of approximately ten minutes so that she could return and apply for a new visa. Westover told Labier that she intended to stay in the United States for three to four weeks while she and her fiancé awaited the finalization of his divorce so that they could get married. After consulting with superior, Labier issued Westover a new visa.

Two months later, on May 7, 1992, Vermont State Police, accompanied by INS agents, conducted a search of Westover's fiancé's home. Westover also lived there. The search revealed approximately 300 marijuana plants being grown in the home. Westover was never charged by the police with any crime. Westover's fiancé was arrested, but charges against him were later dropped when the search was found to have violated the Fourth amendment. At the time of the search, Westover was arrested by INS Agent David Boocock, and a different agent, Agent Maskell, began investigating her status. At this time she

requested a hearing before an immigration judge to determine her removability. From her fiancé's home, Westover was transported to the Vermont State Police barracks, and eventually the police transferred her to INS custody. Westover was questioned at Border Patrol Headquarters by Agent Boocock. According to Boocock, she told him that she had no intention of ever leaving the United States, and she withdrew her request for a hearing.

After the questioning by Boocock, the INS issued Westover a Show Cause order, charging her with deportability under then 8 U.S.C. § 1251 (a) (1) (A) on two separate grounds. [2] First, Westover was charged with being excludable at entry pursuant to 8 U.S.C. § 1182(a) (6) (C) (i) as an alien who by fraud or willful misrepresentation procured a visa or entry into the United States.

Second, based upon the allegations in the first charge, Westover was charged under 8 U.S.C. § 1182 (a) (7) (A) (i) as an alien not in possession of a valid, unexpired visa or entry document. Later, during her removal proceedings and after her visa had expired, the INS additionally charged her under then 8 U.S.C. § 1251 (a) (1) (B) for overstaying her visitor visa. Westover requested relief in the form of adjustment of status under 8 U.S.C. § 1255 and, in the alternative, voluntary departure under 8 U.S.C. § 1254 (e).[3]

Westover testified at her hearing that she had overstayed

---

[2] In 1996, 8 U.S.C. § 1251 was transferred to 8 U.S.C. § 1227. See Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. 104-208, § 305(a) (2), 110 Stat. 3009-546, -598.

[3] The provisions for voluntary departure are now codified at 8 U.S.C. § 1229c.

visas on at least three other occasions. She also admitted to working in the United States without authorization for most of the time that she had been here, and she admitted to her failure to pay federal income taxes on her income. Westover gave somewhat conflicting testimony regarding what she told the border agents at the time of her last entry. She denied telling Agent Labier that she intended to marry or reside in the United States, and she testified that she said nothing regarding where she intended to reside after marrying her fiancé. She also testified, however, that she informed the agents that she and her fiancé would leave the United States, and that they would get married and go to Canada. Westover also gave ambiguous and somewhat conflicting testimony with regard to what her intentions were upon reentry and where she and her fiancé intended to reside. She claimed that she and her husband intended to go to the United Kingdom or to Canada, but she also said they intended to buy a boat and travel. While her husband put his house in Vermont up for sale, suggesting the two intended to leave the country, he did so only after she was placed in removal proceedings, and he continued to own a home in New York. It appears that Westover intended to stay in the United States until her fiancé's divorce became final, yet finalization of the divorce had already been pending almost a year when Westover reentered, and it was not certain at the time of her reentry when the divorce would become final. Westover provided the IJ with affidavits from members of her family, but they gave little indication of where Westover intended to reside.

After the hearing, the IJ determined that Westover had no intention of leaving the United States when she procured the March 5, 1992, visa and found her deportable based upon all three charges.

The IJ denied both requests for discretionary relief. In doing so, the IJ noted that Westover's testimony regarding her

knowledge of the marijuana growing operation in her fiancé's home was not credible; that she gave false information on her application for adjustment of status; that she had worked without authorization in the United States and had paid no federal income tax; and that she had previously overstayed her visitor visas. In light of her "prior adverse immigration record and her lack of complete candor," the IJ denied both forms of relief "as a matter of discretion."

The BIA upheld both the IJ's finding of deportability and his denial of discretionary relief. In reviewing the deportability finding, the BIA excluded from consideration the testimony of both Inspector Labier and Agent Boocock (in response to Westover's challenge to the use of evidence that was the result of the illegal search). Westover also claimed before the BIA that the INS's charging her with overstaying constituted a denial of due process, but the BIA, relying on its own precedent, dismissed this claim.

II

A. Constitutional and Statutory Violations

Westover alleges that her removal proceedings have been tainted by constitutional statutory violations in two senses; that the proceedings themselves are invalid and that certain evidence must, in any event, be excluded.[4] Even though the search of her fiancé's home violated the Fourth Amendment, this

---

[4] Westover also asserts that her arrest and removal proceedings constitute a violation of due process under the Fifth Amendment. Her constitutional challenge arises from an illegal search and a warrantless arrest, though, and is properly analyzed under the Fourth Amendment.

is not a basis upon which she can attack the validity of her removal proceedings that resulted from an illegal search. See *INS v. Lopez-Mendoza*, 468 U.S. 1032, 1040, 104 S. Ct. 3479, 82 L.Ed.2d 778 (1984). An alien may be able to challenge the use of illegally seized evidence, but only if the seizure constituted an "egregious" violation of the Fourth Amendment. *See id.* at 1050-51 (plurality opinion). In this case the BIA affirmed the decision of the IJ without relying on the testimony of the two INS officers.[5] Thus, we need not decide whether statements made at the time of Westover's arrest were admissible.

Westover also claims that INS officers violated federal statutes and regulations in arresting and detaining her. First, she claims that she was not informed of the reason for her arrest or of her removal hearing rights, as required by 8 C.F.R. § 287.3 (c) when an alien is arrested without a warrant. The record reveals, however, that Westover was so informed.

Second, Westover claims that her warrantless arrest violated 8 U.S.C. § 1357 (a) (2), which states that an INS officer "shall have power without warrant . . . to arrest any alien in the United States, if he has reason to believe that the alien so arrested is in the United States [unlawfully] and is likely to escape before a warrant can be obtained for his arrest." The government has not responded to this argument, and it appears from the record that Westover's claim is most likely valid. While INS agents may have had probable cause to arrest Westover by

---

[5] It is not clear why the BIA excluded from consideration the testimony of Inspector Labier, the INS official who was at the border station when Westover reentered. Westover had not alleged any constitutional violations at that border crossing; thus, it appears that there is no reason to exclude Labier's testimony about statement Westover made to him at the time.

the time they took her into custody,[6] there is no evidence that Westover was likely to escape before a warrant could be obtained for her arrest. We do not condone the agents' conduct, which appears from the record to be in direct violation of the statute. Given that Fourth Amendment violations do not constitute grounds for invalidating removal proceedings, though, this mere statutory argument on similar grounds cannot give Westover a basis for relief. See Katris v. INS, 562 F.2d 866, 869 (2d Cir. 1977) (arrest in violation of 8 U.S.C. § 1357 (a) (2) does not void subsequent deportation hearing). Whether evidence obtained from a statutorily invalid arrest should be admitted in an alien's removal hearing is a more difficult question, cf. Navia-Duran v. INS, 568 F.2d 803, 809-811 & n.7 (1st Cir. 1977) (excluding coerced confession but not deciding whether INS agent had violated 8 U.S.C. § 1357 (a) (2) or the effect any such violation might have), but the BIA did not consider any evidence from the time of Westover's arrest.

B. Effect of 8 U.S.C. § 1255(i)

Aliens who, inter alia, have worked in the United States without authorization, are in unlawful immigration status, have failed to maintain lawful status, or have violated the terms of a non-immigrant visa are not eligible for adjustment of status. See 8 U.S.C. § 1255 (c). Under 8 U.S.C. § 1255 (i), however,

---

[6] Westover focuses on the fact that, at the time of her arrest, INS agents had no reason to believe she intended to remain in the United States indefinitely. However, by the time Boocock arrested Westover, he had probable cause to believe that she was involved in the marijuana growing operation, which could have ultimately rendered her removable. See 8 U.S.C. § 1227 (a) (2) (B) (i) (rendering removable an alien convicted of a drug related offense); cf. 8 U.S.C. § 1182 (a) (2) (C) (rendering inadmissible an alien who an immigration officer has reason to believe has aided in drug trafficking).

aliens ineligible for adjustment of status by virtue of § 1255(c) because they have committed certain transgressions can still apply for adjustment of status. See 8 U.S.C. § 1255 (i). They must pay a $1,000 application fee and meet other procedural requirements. See id.

Although she never submitted an application under § 1255 (i), Westover argues that the terms of the section precluded the IJ and the BIA from considering her various transgressions of the immigration laws (specifically, those listed in § 1255 (c) when deciding on her application for adjustment of status. Her argument fails for three reasons.

First, Congress enacted § 1255 (i) in 1994, and the section went into effect on October 1, 1994. See Act of Aug. 26, 1994, Pub. L. 103-317, § 506 (c), 108 Stat. 1724, 1765, as amended by Act of Nov. 26, 1997, Pub. L. 105-119, § 111 (b), 111 Stat. 2440, 2458, set out as note under 8 U.S.C. § 1182. INS regulations specify that § 1255 (i) does not apply to applications for adjustment of status filed before October 1, 1994. See 8 C.F.R. § 245.10 (e). Westover filed her application for adjustment of status on December 17, 1992. Thus, § 1255 (i) does not apply to her application.

Second, before an alien can be granted the discretionary relief of adjustment of status, she must be prima facie eligible to apply for adjustment of status. The provisions in § 1255 (i) render eligible an alien who would otherwise be prima facie ineligible to apply for adjustment of status. These provisions simply do not preclude the IJ of BIA from considering transgressions of the immigration laws in making the ultimate discretionary determination whether to grant adjustment of status.

Third, although Westover asserts that the IJ contravened

the dictates of § 1255 (i) when adjudicating her application for adjustment of status, she did not object at her hearing, and she did not raise the issue on appeal before the BIA. Having remained silent, she has waived any challenge to the BIA's consideration of the factors listed in § 1255 (i). See Bernal-Vallejo v. INS, 195 F.3d 56, 64 (1st Cir. 1999).

C. Estoppel Claim

Westover claims that the INS should be estopped from charging her with being excludable at entry and being present without a valid visa, as she acquired her visa upon instructions from the INS. This argument is without merit. The INS did not instruct Westover that if she intended to stay permanently in the United States, she should apply for a new visa. Instead, the INS instructed Westover that she could leave the country and apply for a new six-month visa. She did this. Nothing in the record suggests that the INS knew, at the time it gave her this advice, that she was intending to violate immigration laws or that she had previously violated immigration laws. Later she was charged with obtaining this visa with the intent to stay indefinitely. Estoppel required showing that the government engaged in "affirmative misconduct" that cause the petitioning individual to act in a way she otherwise would not have. See Akbarin v. INS, 669 F.2d 839 842-43 (1st Cir. 1982). Westover has failed to meet either of these requirements. There is no evidence of government misconduct.

D. Failure to Adjudicate Form I-601

Westover claims that the BIA erred in not adjudicating her form I-601 (waiver of grounds of excludability). Form I-601 allows an alien who would otherwise be ineligible for adjustment of status to have the grounds of her ineligibility waived. See 8 C.F.R. § 212.7 (a) (1) (ii). Since the IJ denied

Westover's application for adjustment of status as a matter of discretion, there was no need to adjudicate the Form I-601.

E. The Overstay Charge

Westover's visa (which the INS considers to have been fraudulently obtained) was valid when the show cause order was issued but lapsed during her removal proceedings. The INS then added the charge of being an overstay to her show cause order. Westover asserts that being charged with overstaying in this context is a violation of due process. The BIA dismissed this claim based upon its holding, twenty-five years ago, in Matter of Halabi, 15 I. & N. Dec. 105 (1974). In that case, the BIA held that it was permissible for the INS to charge the alien with overstaying his visa when his visa had expired because he had remained in the United States to defend himself in removal proceedings initially brought on other grounds. See id. at 106. The BIA noted that the alien had not attempted to obtain an extension from the INS. See id. The Chairman of the BIA dissented, finding that this practice violated due process. See id. at 107 (Roberts, Chairman, dissenting).

If an alien leaves the country before her visa expires and during her deportation proceedings, she may well be unable to defend against the original charges. If she stays, however, she becomes removable as a result of overstaying. It may be that one could successfully challenge the original charges through counsel without personally appearing. The government's position, and the BIA's position in Halabi, is that the alien should apply for an extension of her visa from the INS District Director. However, as the Halabi dissent noted, see id. at 107-08, applying for an extension is likely futile. In this case, the INS considers Westover to be without a valid visa. There is no reason to believe that the District Director would grant Westover an extension on what the INS considers an invalid

visa. Furthermore, in order to apply for an extension, an alien must have maintained her status and must present a valid visa. See 8 C.F.R. § 214.1 (a) (3), (c), (4). The charges lodged against Westover demonstrate that the INS does not consider Westover capable of meeting those requirements. See Halabi, 15 I. & N. Dec. at 107-08 (Roberts, Chairman, dissenting).

We pause to note that the practice of charging aliens with overstaying when they remain in the United States to defend themselves in removal proceedings could cause us some concern on given facts. "The Fifth Amendment entitles aliens to due process of law in deportation proceedings. At the core of these due process rights is . . . a meaningful opportunity to be heard." Choeum v. INS, 129 F. 3d 29, 38 (1st Cir. 1997) (internal quotation marks and citation omitted); *see also Lozada v. INS*, 857 F. 2d 10, 13 (1st Cir. 1988) (due process violated if alien is prevented from reasonably presenting her case). [7]

The BIA upheld the IJ's findings regarding the original charges that Westover was excludable at entry and was present without a valid visa, and we affirm its order of removal on these grounds, without deciding the overstay issue.

F. The BIA's Decision to Uphold the IJ's Finding of Deportability

We review the BIA's decision in this case under the

---

[7] The real danger of this practice is that it could be used to remove an alien on weak or even false original charges as long as the alien's visa will expire during removal proceedings. Cf. Akhbari v. INS, 678 F.2d 575, 576-78 (5th Cir. 1982). The question is difficult and highly fact dependent. INS hearing officers are badly overburdened; the eight years of proceedings here are not the result of agency ineptitude, and there are frequently delays, which usually work to the benefit of the alien.

substantial evidence standards. See INS v. Elias-Zacarias, 502 U.S. 478, 481 (1992); Cordero-Trejo v. INS, 40 F. 3d 482, 488 (1st Cir. 1994). Under this standard, we will reverse the BIA's decision only if the evidence presented would compel us to find for the petitioner. See Elias-Zacarias, 502 U.S. at 483-84. As the recitation of the facts earlier in this opinion shows, the evidence in this case was sufficient for the BIA to uphold the findings of the IJ.

G. Denial of Discretionary Relief

Westover also claims that the BIA erred in denying her application for adjustment of status. Because she was placed into removal proceedings before April 1, 1997, and her final order of removal came after October 30, 1996, Westover's appeal is governed by § 309 (c) (4) (E) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Pub. L. 104-208, 110 Stat. 3009-546, a transitional rule regarding judicial review. See Prado v. Reno, 198 F.3d 286, 288 n.2 (1st Dir. 1999); Kalaw v. INS, 133 F.3d 1147, 1149-50 (9th Cir. 1997); IIRIRA § 309 (c) (4), set out as note under 8 U.S.C. § 101. Under these transitional rules,[8] we lack jurisdiction to review the BIA's discretionary denial of Westover's application for adjustment of status. See Bernal-Vallejo, 195 F. 3d at 61-63.

III

We affirm the BIA's order of removal on the basis of the two original charges lodged by the INS.

---

[8] IRRIRA's permanent rules governing judicial review, codified at 8 U.S.C. § 1252, apply to cases in which removal proceedings commenced on or after April 1, 1997. See Prado, 198 F. 3d at 198 n.2.

APPENDIX B

U. S. Department of Justice
Decision of the Board of Immigration Appeals

Executive Office for Immigration Review

Falls Church, Virginia 22041

File: A71 875 917 - Boston Date: April 14, 1999

In re: DIANA C. BINDLOSS

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Frank J. Schorn, Esquire[1]
Wildes & Weinberg
515 Madison Avenue
8th Floor
New York, NY 10022

ON BEHALF OF SERVICE: Kevin G. Bradley
Assistant District Counsel

CHARGE:

Notice: Sec. 241(a)(1)(A), I&N Act [8 U.S.C. § 1251(a)(1)(A)] - Excludable entry under section 212(a)(7)(A)(i),

---

[1] Our prior order dated May 29, 1998, was sent in error to the wrong attorney and thus was never served on the respondent. Due to this error, we are reissuing the order to the proper attorney of records. Thus, the date of issuance of the amendatory order is the correct decision date.

A71 875 917

I&N Act
[8 U.S.C. § 1182(a)(7)(A)(i)] -
No valid immigrant visa
Lodged: Sec. 241(a)(1)(B), I&N
Act [8 U.S.C. § 1251(a)(1)(B)] -
Entered without inspection

APPLICATION: Deportability; adjustment of status, voluntary departure

AMENDATORY ORDER

In a March 25, 1993, decision an Immigration Judge found the respondent, a native of Tanzania and citizen of Great Britain, deportable as charged, and denied her request for voluntary departure and her application for adjustment of status pursuant to sections 244(e) and 245(a) of the Immigration and Nationality Act, 8 U.S.C. §§ 1254(e), 1255(a) and 245(a) respectively. The Immigration Judge denied both requests for relief in the exercise of discretion, additionally finding that the respondent had failed to show good moral character (I.J. at 10-11).

The respondent raises a number of issues on appeal [2]. She contends that the Immigration Judge's decision was wrong in both law and fact, and that violations by the Immigration and Naturalization Service of regulatory requirements and its own policies violated her right to due process (Respondent's Br. at 12, 15, 17-23, 30, 32, 36-38, 49-50). Specifically, the respondent asserts that a Service officer, who testified against

[2] We note that, although the respondent requested, and was granted, oral argument before the Board, she failed to appear on the scheduled date.

her at her hearing, acted improperly with regard to her detention and interrogation in conjunction with the execution of a search warrant by State troopers at her home (Respondent's Br. at 4, 10, 16-17, 17-18). The respondent avers that evidence of her deportability as obtained under duress, and maintains that the two service officers who testified against her were unreliable, and their testimony inherently incredible. Respondent's Immigration Judge assumed the role of prosecutor, was hostile and biased, and conducted her hearing in an adversarial manner (Notice of Appeal; Respondent's Br. at 25-27). The respondent alleges that the filing of the lodged charge was fundamentally unfair as she only became an overstay due to the length of her deportation proceedings, and she had to remain in the United States to defend herself against the original charge (Respondent's Br. at 32-34). In sum, the respondent asserts that the Service failed to meet its burden of proof of showing by clear, convincing, and unequivocal evidence that, on her last entry into the United States, she was an intending immigrant (Respondent's Br. at 38-39). The respondent alternatively argues that, even if she did then have a preconceived intent to remain in the United States indefinitely, the Immigration Judge's discretionary denial of adjustment was not warranted because she is married to a United States citizen, and there were no "remarkable adverse factors" present in her case (Respondent's Br. at 2-3, 61).

In response the Service asks that we affirm the Immigration Judge's decision, asserting that the respondent's arguments regarding the Service's officers conduct at the time of the execution of a search warrant at her home are irrelevant to whether she was a valid non-immigrant on the date of her last entry into the United States (Service Br. at 6, 12). The Service contends that the respondent's testimony was incredible, and that the Immigration Judge correctly found that she had shown

a lack of good moral character (Service Br. at 10-11).

I. EVIDENTIARY AND FAIR HEARING ISSUES

Initially we find no support for the respondent's contention that she was deprived of a fair hearing on account of improper actions on the part of the Immigration Judge. Our independent review of the record reveals no evidence of bias or inappropriate behavior by the Immigration Judge. The respondent's allegation that the Immigration Judge repeatedly ruled in favor of the Service on evidentiary issues, evidencing bias, is without objective support in the record (Respondent's Br. at 27). Rather, the record shows that the Immigration Judge sustained and overruled objections offered by both parties where appropriate (Tr. at 23, 60, 61, 66, 146, 162, 168, 169, 197-98). Moreover, the Immigration Judge also admitted an exhibit proffered by the respondent over the Service's objections (Tr. at 52). The Immigration Judge's rulings which the respondent contests regarding the introduction of documentary evidence were based on authentication and translation concerns raised by the Service. Moreover, as the respondent herself has conceded, once the perceived deficiencies were corrected, the documents in question were admitted into evidence (Service Br. at 27). [3] Thus, we find that the respondent's arguments in this regard are

---

[3] While the respondent suggests that the Immigration Judge continued to disallow the admission of certain documents into evidence, there is no indication that the Immigration Judge excluded any of the documents for which the respondent subsequently obtained proper translations and authentication. Rather, it appears that the Immigration Judge admitted all of the respondent's documents regarding her application for adjustment of status (Tr. at 116). We find no reason to disturb this ruling, and have considered all of the documents submitted by the respondent, identified as Exhibits 1 through 25, in rendering our decision.

both unfounded and moot.

The respondent also contests the Immigration Judge's denial of a motion she proffered at her hearing to recall a Service officer for cross-examination "following the discovery of new evidence" (Respondent's Br. at 48-49). The episode referenced by the respondent occurred after both parties had rested their cases, and the hearing was continued in order for the Immigration Judge to issue his decision (Tr. at 200-01). When the hearing reconvened, the respondent sought to enter additional documentation into evidence, including a memorandum, and a motion for a continuance to recall witnesses, specifically, a Service officer and the respondent, in light of newly obtained information (Tr. at 202, 205, 209). The new evidence consisted of an affidavit from the officer in question and unspecified evidence regarding the officer's prior employment history (Tr. at 205, 213). The respondent was permitted by the Immigration Judge to essentially make an offer of proof regarding the evidence (Tr. at 205-209). However, the Immigration Judge noted that the respondent's representative had previously questioned the officer extensively, had sufficient opportunity to question both the officer and the respondent, and that the order was untimely (Tr. at 209, 211-12, 215).

An Immigration Judge is broadly empowered to take any action in the course of a deportation hearing consistent with applicable law and regulations. 8 C.F.R. § 242.8(a); see also 8 C.F.R. §§ 236.2 ("nothing contained herein diminishes the authority of an Immigration Judge to conduct proceedings under this part"), 236.3(c)(2) ("[no]thing in this section is intended to limit the authority of the Immigration Judge [to] properly ...control the scope of any evidentiary hearing"). However, as

long as the Immigration and Naturalization Service chooses to initiate proceedings against an alien, the Immigration Judge must move forward to a final determination in an expeditious manner.

See *Matter of Quintero*, 18 I & N Dec. 348 (BIA 1982). In furtherance of this goal, an Immigration Judge may set and extend time limits for the making of motions prior to issuing his or her decision. 8 C.F.R. §3.23(a). As the Immigration Judge correctly indicated, on December 31, 1992, the United States District Court for the District of Vermont granted a motion for reconsideration filed by the respondent's husband seeking to challenge an affidavit filed by a police officer offered in support of a search warrant (Tr. at 212; Attachment to Motion for a Continuance to Recall Witnesses). This filing occurred months prior to the respondent's January 1993 hearing, at which time both the respondent and the Service officer in question testified. Thus, the respondent had sufficient opportunity to cross-examine the Service officer regarding any alleged improprieties relating to his purported involvement in the execution of a search warrant at her premises, and she could have brought this concern to the attention of the Immigration Judge at that time. We additionally note that the affidavit which the respondent's representative sought to enter into evidence was executed in May of 1992, more than 7 months prior to the affiant's being called to testify. Moreover, the respondent's representative indicated at her deportation hearing in January of 1993 that he knew of the pending criminal case against the respondent's husband (Tr. at 141). Thus, the representative's argument that he had received the District Court's actual decision in hand only 10 days before the reconvened hearing is disingenuous as the evidence he sought to enter, and the issues that he wished to raise, could have been introduced much earlier in the proceeding. Accordingly, we find no error in the Immigration

A71 875 917

Judge's denial of the respondent's motion.

II DEPORTABILITY

A. Overstay

The respondent conceded her deportability pursuant to a lodged charge under section 241(a)(1)(B) of the Immigration and Nationality Act, 8 U.S.C. § 1251(a)(1)(B) (Tr. at 108). As such, we find that the respondent's deportability under that section of the Act has been established by clear, unequivocal, and convincing evidence. See Woodby v. INS, 385 U.S. 276 (1966); 8 C.F.R. § 242.14(A).

We find no merit to the respondent's contention that the Service violated her right to due process in lodging the additional charge against her. The Service may lodge additional charges of deportability at any time while a deportation hearing is pending. 8 C.F.R. §§ 3.30, 242.16(d). The respondent's attempt to distinguish the facts of her case from those in Matter of Halabi, 15 I&N Dec. 105 (BIA 1974) is unavailing. In that case, an alien who entered the United States on a non-immigrant visa was initially charged with violating the terms of his visa, and a lodged charge of his being an overstay was subsequently entered when the term of the original visa expired. As the respondent has recognized, we found that "[t]he pendency of deportation proceedings does not entitle a non-immigrant to an extension of his authorized stay in order to attend the scheduled [deportation hearing]" (Respondent's Br. at 33). Id. at 106. As in Matter of Halabi, supra, there is no evidence that the respondent applied for an extension of her stay. Moreover, as a general rule an inquiry into whether or not an overstay was justified is not germane to the question of an alien's deportability

as an overstay. Matter of Teberen, 15 I&N Dec. 689 (BIA 1976).

B. Willful misrepresentation of a material fact

The Immigration Judge found that the respondent was inadmissible as a bona fide visitor for pleasure, and, as such, she was deportable as an immigrant not in possession of a valid immigrant visa or other appropriate document, pursuant to section 241(a)(1)(A) of the Act (I.J. at 6). Based upon our independent review of the record, we find that the Immigration Judge's ruling in this regard was correct.

The respondent maintains that, at the time of her last entry into the United States, she neither entered for the purpose of residing indefinitely, nor did she make any misrepresentation (Respondent's Br. at 5). She contends that she intended to remain in the United States only until her then-fiancee's divorce was final (Respondent's Br. at 6). The respondent testified that she and her fiancee had contemplated getting married outside of the United States, and residing in either Canada or England, or perhaps travel on a boat, indicating that their plans were not "definite" (Tr. at 18, 22, 28, 46, 50, 65). In support of her allegations, the respondent noted that her husband had placed his home in Vermont, where they had lived together at the time that the Order to Show Cause was issued, on sale (Tr. at 50; Exh. 13). She also submitted numerous documents, including affidavits from family members regarding her future plans, as well as evidence of joint bank accounts in Canada, and documents regarding her efforts to earn a Canadian driver's license.

In contrast, the respondent admitted that she has essentially lived continuously in the United States since May of

1987, apart from a cumulative period of about 2 months (Tr. at 12). The respondent testified that, during that same period, she overstayed non-immigrant visas on at least four occasions (Tr. at 6-12, 16, 127). In addition, she testified that she also was employed almost continuously while living in the United States, although she never sought or received permission from the Service to do so (Tr. at 13-16, 126-127). The record also reflects that the respondent left the United States at the Canadian border in March of 1992 for a period of about 10 minutes, before returning to the United States in order to receive a non-immigrant visa as her previous one was about to expire (Tr. at 21, 26, 62-65, 81-82; Service Br. Exh. A). [4]

The respondent has repeatedly violated the immigration laws of this country. While she now asserts that she did not intend to remain in the United States indefinitely following her most recent entry, the evidence reflects otherwise. The respondent has offered vague and conflicting allegations with regard to where she intended to reside following her most recent entry. Yet she has made it clear that she intended to reside in the United States until her husband's divorce was final (Tr. at 6). The evidence reflects that the date of that occurrence was uncertain, which the respondent underscored in her testimony (Tr. at 6, 62; Exhs. 6, 9). Moreover, the record indicates that

---

[4] While the hearing transcript reflects that the respondent testified that she left the United States for 10 days prior to her most recent reentry, the Service has offered an affidavit indicating that review of the hearing tape reveals that the respondent actually testified that she had left the United States for only 10 minutes prior to reentering the United States (Tr. at 7; Respondent's Br. at 60; Service Br. Exh. A). This is corroborated by the testimony of the customs office who examined the respondent at the time of her most recent entry, as he indicated that he particularly remembered her as she left the United States and immediately returned (Tr. at 81-82).

eventuality had been pending for almost a year at the time of her last reentry into the United States (Exh. 9). The respondent also offered inconsistent allegations with regard to what she told the border agents at the time of her last entry regarding her future plans. The respondent repeatedly denied ever telling the inspecting agents at the border that she intended to marry or reside in the United States (Tr. at 6, 31). She specifically testified that she said nothing regarding her intention following the receipt of her husband's divorce papers, including where they would live afterwards. (Tr. at 6). However, she subsequently testified that she had informed the agents that they were going to be leaving the United States (Tr. at 30-31). The respondent then testified that she told the agent who last inspected her at the border that she and her then-fiance were going to get married and move to Canada (Tr. at 65). However, under questioning she shortly thereafter stated that she could not remember her conversation with the inspecting officer, stating, "I don't know what I said" (Tr. at 65).

The respondent has offered similarly inconsistent allegations with regard to her and her husband's actual intention at the time of her last entry in the United States. She testified that they intended to sell their property in Vermont, buy a boat and travel following their marriage (Tr. at 65). Her conflicting allegations undermine any probative value that might have been ascribed to her evidence of Canadian bank accounts and driving lessons as indicative of her intention to reside in that country. In contrast to the noted allegations, the record reflects that a contract for the sale of the home in Vermont was not entered into until March 31, 1992, subsequent to the respondent's arrest[5] at the same house (Exh. 13). As such, we find the respondent's vague allegations that they intended to sell the house in Vermont and move out of the country are incredible, particularly when they put the home on the market only after she ran into trouble

with the immigration authorities, and only weeks before her now-husband would become eligible for marriage. Moreover, the respondent herself testified that her husband also owns a home in New York, yet there was no indication that he sought to sell that home also (Tr. at 129, 155). In addition, although there is a document indicating that the respondent and her husband inquired about purchasing a boat, they were specifically informed by the seller that the boat would not be ready until late March to April, which plans could be modified if they became "seriously interested" (Exh. 14). There is no indication that any further communication ensued. Thus, we find this letter to be of little probative value as an indicator of the respondent's intentions with regard to her residence at the time of her last entry into the United States.

This is similarly true with regard to the various affidavits offered by the respondent in support of her claim. The respondent's sister reported meeting the respondent's then-fiance during a holiday in the United States in April and May 1991, at which time the respondent could marry (Exh. 9). At the time of her visit, the respondent and her husband were already living together, and the respondent moved with him to Vermont (Exh. 9). These facts are confirmed in other affidavits (Exhs. 6, 7, 8). The respondent's husband's sister indicated that the respondent intended to get married in England, none of the remaining affiants made any mention of where the respondent intended to reside at the time of her last entry into the United States, or subsequent thereto.

---

[5] Although the respondent takes great issue on appeal with the use of the term "arrest" to describe the incident wherein 300 marijuana plants were removed from her home and she was detained, we use that term solely because she did so at her hearing.

In view of the totality of the evidence of record, we concur in the Immigration Judge's finding that the respondent was an intending immigrant at the time of her last entry into the United States who was not in possession of a valid immigrant visa or other appropriate document. [6]

III. ADJUSTMENT OF STATUS AND VOLUNTARY DEPARTURE

The respondent challenges the Immigration Judge's discretionary denial of adjustment of status on a number of bases. Initially, we note that her suggestion that a discretionary denial was not warranted merely because she is married to a United States citizen is without support. Marriage to a United States citizen does not, as a matter of law, entitle a deportable alien to adjustment of status. See section 245(a), 8 U.S.C. 1255(a); see also Riasati v. INS, 738 F.2d 1115, 1118 (10th Cir. 1984); Obitz v. District Director of the INS, 623 F.2d 1331 (9th Cir. 1980). Adjustment of status is a matter of administrative grace, not mere statutory eligibility. Ameeriar v. INS, 438 F. 2d 1028, 1030 (3d Cir. 1971), cert dismissed, 404 U.S. 801 (1971). If it is found that a grant of adjustment is not warranted in the exercise of discretion, statutory eligibility need not be addressed. INS v. Bagamasbad, 429 U.S. 24 (1976) (per curiam). This is similarly true of voluntary departure. Section 244(e) of the Act; see also Matter of Seda, 17 I&N Dec. 550(BIA 1980), overruled in part on other grounds, Matter of Ozkok, 19 I&N Dec. 546 (BIA 1988); 8 C.F.R. § 242.17(e). A preconceived intent to remain in the United States, while considered a serious

---

[6] We note that, in rendering this finding, we excluded from consideration the testimony of Officers Labier and Boocock. Thus, we need not reach the respondent's arguments in this regard.

adverse consideration, is only one factor to consider in exercising discretion on a discretionary application for relief. See Matter of Ibrahim, 18 I&N Dec. 55 (BIA 1981); Matter of Cavazos, 17 I&N Dec. 215 (BIA 1980). An Immigration Judge may consider such adverse factors as the alien's prior immigration history, the nature of his entry or entries, and any violations of the immigration and other laws of the United States. Matter of Lemhammad, 20 I&N Dec. 316, 326 (BIA 1991). Generally, where there are adverse factors present, favorable factors such as family ties, hardship, length of residence in the United States, will be considered as countervailing factors meriting a favorable exercise of discretion, and in the absence of adverse factors, adjustment will be ordinarily granted in discretion. Id; Matter of Arai, 13 I&N Dec. 494 (BIA 1970).

In the instant appeal, the respondent admittedly has violated United States immigration laws on numerous occasions, including overstaying the period of her visa on several occasions and working without authorization. The respondent also testified that she never paid taxes on her income (Tr. at 121-22, 128). The respondent offered several excuses for not doing so, including that she was working sporadically, did not make much money, and did not have a Social Security number. (Tr. at 128). While she suggested at their hearing that she was attempting to repay her back taxes, she conceded that she had not even inquired into the possibility or procedure for obtaining a Social Security number in order to do so (Tr. at 128-29). The respondent also testified that she was arrested by Vermont State police in May of 1992 (Tr. at 139-141). She conceded that the police confiscated about 300 marijuana plants from her and her now-husband's home on that date (Tr. at 142-45). The respondent denied that she was aware that there were marijuana plants growing in her home (Tr. at 145-47). However, she also

testified that she had been living in the house for about 8 months before the police arrived, and that the plants were being grown in a room on the same floor as her bedroom (Tr. at 148-151). While the respondent testified that she had been in that room before, she stated that she had never seen any marijuana plants there (Tr. at 151). We find the respondent's protestations regarding her lack of knowledge of the existence of 300 marijuana plants grown in a room in close proximity to her bedroom in a house in which she had lived for about 8 months to be rather incredible.

The respondent's sole favorable equity is her marriage to a United States citizen, which was entered into following the issuance of an Order to Show Cause on May 7, 1992, (Exh. 1, Tr. at 18-19). However, the equity of a marriage and the weight given to any hardship to the spouse is diminished if, as here, the parties married after the commencement of deportation proceedings with knowledge that the alien might be deported. Matter of Mendez, Interim Decision 3272 (BIA 1996); citing Ghassan v. INS, 972 F.2d 631 (5th Cir. 1992), cert. denied 507 U.S. 971 (1993). No evidence has been introduced that the respondent has any family ties in the United States apart from her husband as her sisters and parents live elsewhere (Exhs. 6, 9). Thus, we find that the solitary diminished equity favoring a grant of discretion fails to outweigh the numerous above-noted negative equities. Accordingly, we find no error in the Immigration Judge's denial of the respondent's application for adjustment of status and request for voluntary departure in the exercise of discretion.

IV. CONCLUSION

In sum, we find no error on the part of the Immigration Judge. Accordingly, the following order will be entered.

ORDER: The appeal is dismissed.

FOR THE BOARD